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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~746~~. 398 155

WILLIAM C. IDE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 22, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 746.

WILLIAM C. IDE, APPELLANT,

vs.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 20, 1891.

1 In the Court of Claims.

WILLIAM C. IDE
vs.
THE UNITED STATES. } 16425.

I.—*Petition. Filed January* 4, 1889.

To the hon. Court of Claims:

The petition of William C. Ide respectfully shows and states—

That your petitioner's full name is William Carey Ide; that he resides in the city of Buffalo, county of Erie, and State of New York, and is the original, sole, and only claimant in this matter.

That he is a citizen of the United States of America, and has at all times borne true faith and allegiance to the Government of the United States, and that he has not voluntarily aided, abetted, or given encouragement to rebellion against it.

And your petitioner further shows that heretofore and on the seventeenth day of August, A. D. 1861, and while your petitioner resided at Springfield, in the State of Massachusetts, the President of the said United States nominated and, by and with the advice and consent of the Senate, appointed him an officer in the Army of the United States, to wit, first lieutenant in the Thirteenth regiment of infantry, in the service of the United States, to rank as such from the fourteenth day of May, A. D. 1861, as will more fully appear by his commission as such first lieutenant, bearing date on said seventeenth day of August, A. D. 1861, and recorded in the Adjutant General's office in volume seventeen, at page twenty-one, on said seventeenth day of August, A. D. 1861; that he accepted such appointment and became and was such first lieutenant and served as such until on or about the second day of July, A. D. 1862.

And your petitioner further shows that on said second day of July, A. D. 1862, the President of the United States nominated and, by and with the advice and consent of the Senate, appointed him captain in the Thirteenth regiment of infantry, in the service of the United States, to rank as such from the fourteenth day of May, A. D. 1862, as will more fully appear by his commission as such captain, which bears date on said second day of July, A. D. 1862, and was recorded in the Adjutant General's office in volume seventeen, page eighty-four, on said last-named day.

That he accepted such appointment and became and was such captain from and after the fourteenth day of May, A. D. 1862, and continued thereafter to act and serve as a captain in the Thirteenth regiment of infantry in the service of the United States.

2 And your petitioner further alleges that, as he is informed, advised, and believes, he has been ever since said fourteenth day of May, A. D. 1862, and now is an officer in the Army of the United States, to wit, a captain in the Thirteenth regiment of infantry in its service, and as such captain is entitled to have and receive and said United States is liable to him for and promised

and agreed to pay him the pay, allowances, and emoluments which the statute in such case made and provided prescribes and provides shall be allowed, provided for, and paid to a captain of infantry in the service of the United States.

And your petitioner further shows that in and by the said statute it was and is provided that a captain of the army, not mounted, shall be entitled to the pay of eighteen hundred dollars a year, and that there shall he allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service, but that the total amount of such increase for length of service shall not exceed forty per centum on the yearly pay of the grade as provided by law, and that the sums so allowed shall be paid in monthly payments by the paymaster.

And your petitioner further alleges, as he is advised and believes, that by virtue of the said statutes and of his nomination and appointment to and acceptance by him of the said office of captain, and his service as such, he became, was, and is entitled to have and receive, and the said United States promised and agreed to pay to him, the salary or pay so fixed by law, to wit, the sum of eighteen hundred dollars a year for and during the first term of five years that he was such captain; the sum of nineteen hundred and eighty dol-
3 lars a year during the second term of five years that he was such captain, the sum of twenty-one hundred and sixty dollars a year during the third term of five years that he was such captain, the sum of twenty-three hundred and forty dollars a year during the fourth term of five years that he was such captain, the sum of twenty-five hundred and twenty dollars a year during the fifth term of five years that he was such captain, and the sum of twenty-seven hundred dollars a year for and during the time that he has been such captain since the expiration of the fifth term of five years of service as captain, and that he was so entitled to have and receive such pay, and the United States so promised and agreed to pay the same to him in equal monthly payments in each and every year that he has been such captain as aforesaid.

And your petitioner admits and states that the United States paid to him the amount of pay due to him as such captain up to and including the thirty-first day of May, A. D. 1869, and he avers and alleges that by reason of the premises the United States became, was, and is justly and truly indebted to him in the sum of five thousand eight hundred and fifty-two dollars for his pay as such captain from the said thirty-first day of May, A. D. 1869, to the fourteenth day of May, A. D. 1872, being the last two years eleven months and fourteen days of the second term of five years of his said captaincy; and in the sum of ten thousand eight hundred dollars for his pay as such captain from the fourteenth day of May, A. D. 1872, to the fourteenth day of May, A. D. 1877, being the third term of five years of his said captaincy; and in the sum of eleven thousand seven hundred dollars for his pay as such captain

from the fourteenth day of May, A. D. 1877, to the fourteenth
4 day of May, A. D. 1882, being the fourth term of five years of his said captaincy; and in the sum of twelve thousand six hundred dollars for his pay as such captain from the fourteenth day of May, A. D. 1882, to the fourteenth day of May, A. D. 1887, being the fifth term of five years of his said captaincy; and in the sum of three thousand nine hundred and forty-five dollars for his pay as such captain from the fourteenth day of May, A. D. 1887, to the first day of November, A. D. 1888, being a part of the sixth term of five years of said captaincy; payable in equal monthly payments at the end of each and every month in each and every year as aforesaid.

And your petitioner further shows that heretofore and on or about the twelfth day of April, A. D. 1888, he submitted a statement of his case to the President of the United States, claiming that he was then and ever since his appointment had been an officer in the Army of the United States as hereinbefore stated, and that the said President referred said statement and claim to the War Department for its consideration and decision, and that on or about the fifteenth day of May, A. D. 1888, the War Department rejected said claim and decided not to allow or admit your petitioner's claim that he was still an officer of the army.

That thereafter, and on or about the twenty-first day of November, A. D. 1888, your petitioner again submitted to said department, through the Paymaster General of the United States, his claim that he was such officer in the service of the United States for and during the time aforesaid and entitled to pay as aforesaid and demanded the adjustment and payment of his said claim, but that the said claim and demand were rejected, and the United States has not paid

him the amount of his pay which accrued and became due
5 and payable to him from and after the thirty-first day of May, A. D. 1869, or any part thereof, although payment thereof has been demanded as aforesaid, but has neglected and refused and still does neglect and refuse to pay the same or any thereof.

And your petitioner avers that the United States of America is justly indebted to him in the sum of forty-four thousand eight hundred and ninety-seven dollars for his pay as a captain in its service from and after the thirty-first day of May, A. D. 1869, to the first day of November, A. D. 1888.

And your petitioner further shows—

That he is the owner of said claim and the only person interested therein; that no assignment or transfer of said claim or of any part thereof or interest therein has been made; that he is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in this petition to be true.

And therefore your petitioner prays for and demands judgment against the United States of America for forty-four thousand eight hundred and ninety-seven dollars, or for so much and such part of said sum as this honorable court shall adjudge to be due and payable to him, and for a decree that the amount adjudged to be so due

and payable shall be paid to him according to law and the rules and practice of this honorable court; and for such further, other, or different relief as shall be just and proper in the premises. And your petitioner, as in duty bound, will ever pray, etc.

WILLIAM CAREY IDE, *Petitioner.*

GEORGE WADSWORTH,
Petitioner's Attorney-in-Fact, Buffalo, N. Y.

6 UNITED STATES OF AMERICA, }
Northern District of New York, County of Erie, } ss:

William Carey Ide, being duly sworn, says that he is the claimant and petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; and further says not.

WILLIAM CAREY IDE.

Sworn to this 24th day of December, 1888, before me—
[L. S.] JOSEPH L. FAIRCHILD,
A Commissioner of the Circuit Court of the United States for the Northern District of New York.

7 II.—*Traverse. Filed February* 18, 1889.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

8 III.—*Argument and Submission of Case.*

At a Court of Claims held in the city of Washington on the 7th day of May, 1890—

The case of William C. Ide *vs.* The United States, No. 16425, was argued by Mr. Wadsworth for the claimant and Mr. Dewees for the defendants, and submitted.

9 IV.—*Findings of Fact and Conclusion of Law. Filed May* 26, 1890.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

August 17, 1861, the claimant was appointed and commissioned first lieutenant in the Thirteenth regiment United States infantry, to rank as such from May 14, 1861.

July 2, 1862, he was appointed captain in said regiment, to rank from May 14, 1862, and was assigned to the command of Company C, in said regiment, in the service of the United States.

II.

In March, 1869, claimant was tried by a general court-martial upon charges of "absence without leave" and "disobedience of orders," found guilty, and by said court-martial sentenced "to be dismissed the service of the United States."

Alfred H. Terry, the general commanding the department in which said court-martial was held, approved its proceedings, findings, and sentence, and on April 13, 1869, forwarded the record to the Secretary of War for the action of the President of the United States.

May 12, 1869, John A. Rawlins, then Secretary of War, made an order or indorsement on the proceedings and sentence of said general court-martial as follows, to wit:

WAR DEPARTMENT, WASHINGTON CITY, *May* 12, 1869.

In conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general court-martial in the foregoing case of Bvt. Maj. William C. Ide, captain Thirteenth infantry, have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved, and the sentence will be duly executed.

JNO. A. RAWLINS,
Secretary of War.

Thereupon, by command of General Sherman, the Adjutant General issued an order that—

Bvt. Maj. William C. Ide, captain Thirteenth United States infantry, accordingly ceases to be an officer of the army from the date of this order.

The President never confirmed nor disapproved the proceedings or sentence of said court-martial, nor took any action thereon, nor made any orders in the case, unless he did so by some of the facts herein stated.

10 III.

Claimant was paid his salary as captain of the Thirteenth infantry to include May 31, 1869. He has never been paid since that date as an officer of the army.

November 20, 1888, he demanded pay as a captain of infantry in the U. S. Army from May 31, 1869, and received the following reply:

WAR DEPARTMENT, PAYMASTER GENERAL'S OFFICE,
WASHINGTON, *November* 22, 1888.

William C. Ide, Esq., late captain Thirteenth infantry, Buffalo, N.Y.

SIR: Your letter of November 20, 1888, demanding pay as an officer of the army from the date of your dismissal under general orders No. 26, of 1869, to the present date, is received, and in reply you are informed that this office has no authority to recognize any one as an officer of the army unless his name is borne upon the official register or notice of his appointment is communicated by the military authorities.

In the absence of any recognition of you as an officer of the army, your claim for pay must be and is refused.

Respectfully your obedient servant,

WM. B. ROCHESTER,
Paymaster General U. S. Army.

IV.

March 11, 1869, in compliance with an act of Congress approved March 3, 1869, the infantry of the army was consolidated into twenty-five regiments, but the Thirteenth regiment was not consolidated with any other.

By this consolidation the United States infantry was reduced from forty-five regiments to twenty-five.

By the order effecting such consolidation it was ordered that:

III. The senior company officers from each grade present for duty with any two regiments to be consolidated and fit for active service will be the officers of the consolidated regiment. The supernumerary officers will be ordered to their homes to await further orders. * * *

V. All vacancies that may hereafter occur in the twenty-five infantry regiments will be filled by assignment of the senior officers of the same grade from the list of officers awaiting orders.

V.

After said claimant was so tried and sentenced his said Company C, Thirteenth regiment infantry, U S. Army, was commanded by lieutenants to July 1, 1870, when Capt. Alfred L. Hough took command of it. Capt. B. H. Rogers took command of said company May 2, 1874; Capt. H. C. Pratt on August 28, 1878, and Capt. B. H. Rogers again on November 11, 1878. No other captains have been in command of said Company C, Thirteenth regiment, since the claimant was dismissed.

William G. Rankin was appointed captain U. S. Army, June 18, 1861; belonged to Thirty-first United States infantry; became unassigned May 15, 1869, when the Thirty-first and Twenty-second regiments were consolidated; was assigned to the Thirteenth regiment infantry July 14, 1869; commanded Company D of that regiment, and was discharged at his own request December 31, 1870, under section 3, act of Congress approved July 15, 1870.

11. Seth Bonney was promoted from first lieutenant to captain in Twenty-seventh United States infantry December 5, 1868, to rank from November 11, 1868; he became unassigned by the consolidation of the Twenty-seventh regiment with the Ninth, June 14, 1869; was assigned to the Thirteenth infantry January 26, 1871; commanded Company D of that regiment, and resigned April 1, 1872.

Philip H. Ellis was promoted from second lieutenant to be first lieutenant of Thirty-first regiment infantry, to rank from December 28, 1866; became unassigned by the consolidation of the Thirty-first with the Twenty-second regiment June 21, 1869; was assigned to the Thirteenth infantry January 1, 1871, and on June 8, 1872, was promoted to the vacancy of captain in that regiment caused by the resignation of Captain Seth Bonney; was placed in command of Company D, Thirteenth regiment, April 1, 1872, and has retained command of that company to the present time.

Alfred L. Hough was appointed captain Nineteenth infantry June 29, 1861; transferred to the Twenty-eighth infantry September 21, 1866; became unassigned March 31, 1869, by the consolidation of the Twenty-eighth with the Nineteenth regiment; was assigned to the Thirteenth regiment April 16, 1870, and promoted April 13, 1874, to be major of the Twenty-second infantry, to rank from February 18, 1874.

Benjamin H. Rogers was promoted from second lieutenant to first lieutenant in the Twenty-first infantry July 23, 1867; became unassigned July 9, 1870; was assigned to the Thirteenth infantry December 31, 1870, and was promoted April 13, 1874, to be captain in the Thirteenth infantry, "to fill the vacancy caused by the promotion of Capt. Alfred L. Hough to be major of the Twenty-second infantry.

Henry C. Pratt was commissioned second lieutenant Thirteenth infantry July 27, 1866; promoted to be first lieutenant Thirteenth infantry, to rank from July 1, 1867; promoted to be captain in the Thirteenth infantry July 3, 1876, to rank from June 10, 1876, "to fill the vacancy caused by the promotion of Capt. Robert Nugent, Thirteenth infantry, to be major of the Twenty-fourth infantry."

VI.

April 16, 1887, the claimant applied by petition to the President for restoration or reappointment in the army, and April 4, 1888, filed a supplemental petition, to which he received the following reply:

WAR DEPARTMENT, WASHINGTON CITY, *May* 15, 1888.

SIR: This department is in receipt, by reference from the President, of a supplemental petition from you, dated April 4, 1888, for restoration or reappointment to the Army, as well as a letter from Mr. George Wadsworth, dated April 11, 1888, giving reasons why your dismissal was illegal and not affected by any subsequent promotion or appointment.

An investigation shows that, while the indorsement upon the

record in your case is similar to that of Major Runkle's, the subsequent action taken was different. The vacancy created by your dismissal was filled by the transfer thereto, on July 14, 1869, by Capt. William G. Rankin, who was discharged December 31, 1870, this vacancy being filled under general order No. 1 of 1870 by Capt. Seth Bonney, unassigned. Captain Bonney resigned April 1, 1872, and 1st Lieut. P. H. Ellis was promoted to the vacancy and confirmed by the Senate June 5, 1872.

12 The decision of the Supreme Court in the Blake case (103 U. S., 227) is completely applicable to this condition of affairs, and under that opinion the filling of the office by the confirmation of Ellis superseded the legal holder of the office at the time. Although the appointment of Ellis was vice Bonney, resigned, it was, nevertheless, an appointment to the captaincy in the Thirteenth infantry, of which you were still, in the law, the holder and such appointment and confirmation operated to succeed you.

The War Department cannot, therefore, admit your claim that you are still an officer of the army.

Very respectfully, WILLIAM C. ENDICOTT,
Secretary of War.

Mr. William C. Ide, Buffalo, N. Y.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant has no cause of action, and his petition must be dismissed.

V.—*Opinion of the Court.*

RICHARDSON, *C. J.*, delivered the opinion of the court:

The claimant, a captain in Thirteenth infantry of the army, was tried by a general court-martial upon charges of "absence without leave" and "disobedience of orders;" was found guilty, and sentenced "to be dismissed the service of the United States."

The proceedings, findings, and sentence were approved by the general commanding the department and the record was forwarded to the Secretary of War for action of the President in April, 1869.

The Secretary of War made the following indorsement and order thereon:

WAR DEPARTMENT, WASHINGTON CITY, *May* 12, 1869.

In conformity with the sixty-fifth of the rules and articles of war the proceedings of the general court-martial in the foregoing case of Bvt. Maj. Wm. C. Ide, captain Thirteenth infantry, have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved, and the sentence will be duly executed.

JNO. A. RAWLINS,
Secretary of War.

This order was thereupon carried into execution. The claimant left the army in pursuance thereof; his name was dropped from the Army Register, and has never since appeared thereon. He performed no official duty after that time, and it does not appear that he offered to perform any until April 16, 1887, when he applied by petition to President Cleveland for restoration or reappointment, and his request was denied. He has received no pay as an officer of the army since his dismissal, and it does not appear that he ever asked for any until he made demand on the 20th of November, 1888. To this demand the Paymaster General replied that the office had no authority to recognize any one as an officer of the army unless his name was borne upon the official register or notice of his appointment was communicated by the military authorities.

On the 4th of January, 1889, he filed his petition in this court claiming the pay of a captain in the army from May 31, 1869, amounting to the sum of $44,897.

13 The claim is founded upon the alleged illegality of the action of the Secretary of War in ordering the sentence of the court-martial dismissing the claimant from the army to be executed. The decision of the Supreme Court in Runkle's case (122 U. S. R., 543) is relied upon in support of his petition.

If this case were identical with the Runkle case, and involved only the question of the illegality of the action taken upon the findings and sentence of the court-martial dismissing the claimant from the service, his contention would be correct. The phraseology of the indorsement by Secretary Rawlins in this case and that of Secretary Belknap in Runkle's case are not the same, and as to whether they are alike in legal effect, we express no opinion. There are other material differences between the two cases which have an important bearing on our decision.

In time of peace, at least, an officer is not obliged to obey an illegal order. If such an order dismissing a subordinate from office be issued by a superior, but not by the highest officer in authority, the subordinate is not left without some obligations resting upon him. It becomes his duty, at once or within a reasonable time, to appeal to the highest authority for revocation, modification, or correction of the illegal order. If he obeys and submits to the order without appeal and without objection for an unreasonable length of time, he must be held to have abandoned all title and claim to the office and to its emoluments, and to have waived his right to both.

The claimant was dismissed during the early part of the first administration of President Grant, while General Rawlins was Secretary of War. Had he appealed to President Grant at any time during the more than three years remaining of his then term of the Presidency, or during the four years of his second term, the error, if any there were, could have been corrected. But he allowed President Grant's two terms, and the terms of his three immediate successors (Hayes, Garfield, and Arthur) to expire without making appeal to either of them. Seven Secretaries of War, after Secretary Rawlins, came and went without any complaint from the claimant (Sherman, Belknap, Taft, Cameron, McCrary, Ramsey, and Lincoln).

It was more than eighteen years after his dismissal before he attempted to assert any right to the office, or any claim to the salary, and he made no effort anywhere to obtain possession of the office from which he alleges he was illegally dismissed. During the whole time he performed no official service and offered to perform none. Therein his case differs materially from that of Runkle. Referring to the order of Secretary Belknap in Runkle's case, the Supreme Court say:

After this order was issued, but on the same day, Runkle presented to President Grant a petition setting forth, among other things, "that the proceedings of said court had not been approved by the President of the United States, as required by law." This petition was not only received by President Grant, but it was by him referred to the Judge Advocate General for "review" and report. Upon this reference the Judge Advocate General acted and reported on the whole case. President Grant did nothing further in the premises, and the matter remained open when President Hayes came into office.

Thus Runkle early and at once asserted his right to the office and kept the question open and before the Executive until it was taken up and decided in his favor four years thereafter. He did nothing from which an abandonment of the office could be inferred, for he was upon the retired list and was subject to no duty.

14 It is said that the claimant submitted to the order dismissing him and made no appeal to the President for eighteen years because he was ignorant of the law until the decision of the Runkle case in 1887. But he was bound to know the law. *Ignorantia legis neminem excusat.* The law had been upon the statute book since 1802 in substantially the same language as it appeared when he was dismissed (act of 1802, March 16, chap. 9, sec. 10, 2 Stat. L., 134), and it was included among the articles of war enacted in 1806 (act of 1806, chap. 20, art. 65, 2 Stat. L., 367).

By the decision in Runkle's case the Supreme Court did not make the law; they only threw judicial light upon what had been the law for more than eighty years, as everybody was bound to know.

Runkle knew the law and acted upon that knowledge with vigilance. Thus he waived no rights and lost none. Besides, unlike the claimant, he was upon the retired list, with no duties to perform, and while his name was not on the Army Register, no other officer took his place.

The fact that this is not an action directly to regain possession of an office must not be lost sight of. That issue cannot be tried in this court. Whether the claimant was dismissed rightfully or wrongfully, the fact remains that he was *de facto* out of the army, and some other officer was required to perform the active duties belonging to the office from which he was dismissed.

The Government is not responsible for the consequences of illegal orders of subordinate officers, the execution of which is acquiesced in for an unreasonable length of time by the aggrieved party, without appeal to the highest authority.

The point decided in Blake's case (103 U. S. R., 227), referred to in the letter of the Secretary of War, set out in finding six and much discussed at the trial, has not been taken into consideration, and its application, if any, to the facts here found is not passed upon.

The only question now decided is whether or not the claimant, an officer on the active list of the army, under all the circumstances of the case as disclosed in the findings, is entitled to recover salary of an office the duties of which he never performed for eighteen years, and never offered to perform during that period, and which were discharged by some other officer.

On that issue, and on that alone, we hold that he is not entitled to recover, and his petition is dismissed.

15 VI.—*Judgment of Court.*

WILLIAM C. IDE
vs.
THE UNITED STATES. } 16425.

At a Court of Claims held in the city of Washington on the 26th day of May, A. D. 1890, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, William C. Ide, be dismissed.

By the COURT.

16 VII.—*Application for and Allowance of Appeal*

WILLIAM C. IDE
vs.
THE UNITED STATES. } 16425.

From the judgment rendered in the above-entitled cause on May 26, 1890, in favor of the defendants, the claimant, by George Wadsworth, his attorney, on the 9th day of June, 1890, makes application for and gives notice of an appeal to the Supreme Court of the United States.

WILLIAM C. IDE, *Claimant*,
By GEORGE WADSWORTH,
His Attorney.

Filed and allowed in open court June 9, 1890.

WILLIAM A. RICHARDSON,
Chief Justice.

17 In the Court of Claims.

WILLIAM C. IDE
vs.
THE UNITED STATES. } No. 16425.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of claimant for and allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 10th day of June, 1890.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 746. William C. Ide, appellant, *vs.* The United States. Filed August 22, 1890.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

WILLIAM C. IDE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

BRIEF FOR APPELLANT.

GEORGE WADSWORTH,

Attorney for Appellant,

Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

WILLIAM C. IDE, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee.
} Brief for appellant.

Appeal from Judgment of the U. S. Court of Claims.

STATEMENT.

The appellant brought this action to recover arrears of salary alleged to be due to him as a Captain in the U. S Army

(See Record pp. 5-8).

August 17, 1861, appellant was appointed and commissioned first lieutenant in the 13th Regiment U. S Infantry to rank as such from May 14, 1861.

July 2, 1862, he was appointed and commissioned captain in said Regiment to rank as such from May 14th, 1862, and assigned to command Company C in said Regiment (Record p 5)

In March, 1869, he was tried by a general Court-Martial, upon charges of 'absence without leave' and 'disobedience of orders.' (Rec. p 5)

The absence and disobedience consisted of not joining his Regiment within a proper time, after being ordered to do so. He was found guilty and the sentence of the Court Martial was that he be dismissed from the service. (Rec p. 5).

The General, commanding the department in which said Court Martial was held, approved its proceedings, findings and sentence, and on April 13, 1869, forwarded the record to the Secretary of War for the action of the President of the United States. (Rec. p. 5).

May 12, 1869, John A. Rawlins, then Secretary of War, endorsed said proceedings and sentence as follows, to-wit:

WAR DEPARTMENT WASHINGTON CITY, May 12, 1869.

In conformity with the sixty-fifth of the rules and articles of war, the proceedings of the general Court Martial in the foregoing case of Bvt. Maj. William C. Ide, Captain Thirteenth Infantry, have been forwarded to the Secretary of War, for the action of the President of the United States, and the proceedings, finding and sentence are approved, and the sentence will be duly executed. (Rec. p. 5).

JNO. A. RAWLINS,
Secretary of War.

Thereupon, by command of Gen'l. Sherman, the Adjutant General issued an order that

Bvt. Maj William C. Ide accordingly ceases to be an officer of the Army from the date of this order. (Rec. p. 5.)

The President never confirmed nor disapproved the proceedings or sentence of said Court Martial or took any action thereon, or made any orders in the case, unless some of the facts herein stated are equivalent to such action by the President. (Rec. p. 5).

Nothing in the Record shows that the proceedings were ever submitted to the President, or that he ever saw or heard of them, much less that he ever approved thereof or made any order thereon.

Appellant's salary was paid to and including May 31, 1869; nothing has been paid to him since. (Rec. p. 5). While the Court-Martial was being held, to wit: March 11, 1869, in compliance with an act of Congress, approved March 3, 1869, the Infantry of the Army was consolidated into twenty-five regiments, but the Thirteenth Regiment, to which appellant belonged was not consolidated with any other. (Rec p 6).

By this consolidation the U. S. Infantry was reduced from forty five regiments to twenty-five. By the order of consolidation it was ordered that:

III. The senior company officers from each grade present for duty with any two regiments to be consolidated and fit for active service will be the officers of the consolidated regiment. The supernumerary officers will be ordered to their homes to await further orders.

V. All vacancies that may hereafter occur in the twenty-five Infantry Regiments will be filled by assignment of the senior officers of the same grade from the list of officers awaiting orders. (Rec p 6)

Appellant was ignorant of the fact that his sentence had not been approved by the President, until a short time before he began this action.

Thereupon in April, 1887, and April, 1888, he petitioned the President for restoration or reappointment to the army, setting forth in the latter petition, the reason why his dismissal was illegal, &c., (rec p. 7) and on May 15, 1888, the Secretary of War replied that the vacancy created by his dismissal was filled by the transfer thereto on July 14, 1869, of Capt. William G. Rankin, who was discharged Dec 31, 1870, this vacancy being filled under general order No. 1. of 1870, by Capt. Seth Bonney, unassigned, who resigned April 1, 1872, and 1st lieutenant P H. Ellis was promoted to the vacancy and confirmed by the Senate June 5, 1872; that the appointment and confirmation of Ellis (June 5, 1872), superseded the legal holder of the office at the time, and although it was an appointment, vice Bonney resigned; it was 'an appointment to the captaincy in the 13th Infantry of which you (Ide) were still in law the holder' and operated to succeed (supersede?) you '

Secretary's letter record pp. 7-8.

But the record shows that the Secretary of War was mistaken as to the facts and that the statements so made by him are not true. See record finding V. pp 6 7.

Appellant commanded Co C, 13th Regiment.

After he was tried and sentenced Company C was commanded by its lieutenants to July 1, 1870, when Capt A L Hough took command; after him Capt. B H Rogers on May 2, 1874; Capt. H. C. Pratt, Aug. 28, 1878, and Capt. B H. Rogers again Nov. 11, 1878, and no other captains have commanded Co C, 13th Reg't, since Capt. Ide was court-martialled

Capt Hough was appointed captain in the 19th Reg't, June 29, 1861; before Capt Ide was court martialled, he became unassigned March 31, 1869; by the consolidation of the 28th with the 19th, was assigned to the 13th, April 16, 1870, and promoted to be major of the 22nd, Feb 18, 1874

Benj. H Rogers was a lieutenant in the 21st Reg't; became unassigned July 9, 1870; was assigned to the 13th, Dec 31. 1870, and promoted April 13, 1874, to be captain in the 13th 'to fill the vacancy caused by the promotion of Capt. Alfred L Hough to be major of the 22d Infantry.'

Henry C Pratt was a lieutenant of the 13th until June 16, 1876, when he was promoted to be captain in the 13th 'to fill the vacancy caused by the promotion of Capt. Robert Nugent, 13th Infantry, to be major of the 24th Infantry.'

These were all the captains who commanded appellant's Co. C after his court-martial and not one of them was appointed to fill the vacancy caused by his dismissal, or with any reference to his case.

None of these officers are mentioned in the Secretary's letter of May 15, 1888; he refers to Capts. Rankin, Bonney and Ellis only. W. G. Rankin was appointed captain June 18, 1861, and Seth Bonney was so appointed Dec 5, 1868; both of these appointments were made before Capt Ide was court-martialled.

Philip H. Ellis was a lieutenant in the 31st Regt.; he became unassigned June 21, 1869, by the consolidation of the 31st with the 22nd; he was assigned to the 13th, January 1, 1871, and on June 8, 1872, was promoted to the vacancy of captain in that regiment caused by the resignation of Capt. Seth Bonney.'

Neither Rankin, Bonney or Ellis ever commanded Co. C; they commanded Co. D (Rec pp. 6-7).

No promotion was ever made to fill a vacancy caused by the dismissal of Capt. Ide, and to this day no person, other than himself, fills the office.

On November 20, 1888, appellant demanded his pay as a captain from May 31, 1869, and it was refused. (Rec. pp. 5-6).

He then began this action; his petition was filed Jan. 4, 1889. (Rec p. 1).

The pay of a Captain of Infantry was and is $1800 per year for his first term of five years' service; $1980 per year for his second term of five years' service, $2178 per year for his third term of five years' service, $2395.80 per year for his fourth term of five years' service, $2635.38 per year after his fourth term of five years expires.

U S. Revised Stat. Ed. of 1875, p. 219, Sec's 1261, 1262.

Appellant was appointed captain in the 13th Regiment to rank from May 14th, 1862. (Rec. p. 5).

His first term of five years' service expired May 14, 1867.

His second term of five years' service expired May 14, 1872.

His third term of five years' service expired May 14, 1877.

His fourth term of five years' service expired May 14, 1882.

His pay from May 31, 1869, the day it was stopped, to Jan 4, 1869, when his petition in this case was filed, at the rates above named amounts to $46,217.00.

His pay for the six years immediately preceding the filing of the petition is $15,812.28, being at the rate of $2,635.38 per year for said six years.

The Court of Claims found for the defendant and dismissed the petition upon the sole and only ground that the appellant had been guilty of laches in bringing this action, and expressly refused to decide the case upon the merits or to pass upon the question of law involved therein, but cites no authorities to sustain its decision.

See opinion pp 8-11 of record.

From that decision the claimant appeals to this court.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in deciding that the appellant had no cause of action.

2. The Court erred in dismissing the petition.

3. The Court erred in deciding that an officer in the army is not obliged to obey an illegal order of his superior, to-wit: that Capt Ide was not obliged to obey the order of dismissal issued by General Sherman.

4. The Court erred in deciding that appellant's right to recover pay for the six years last preceding the filing of his petition was barred by laches.

5. The Court erred by not deciding that the proceedings of the court-martial by which appellant was tried and sentenced were not laid before or submitted to the President of the United States for his confirmation or disapproval, and orders in the case as required by the 65th Article of War then in force.

6. The Court erred in that it did not decide that it was not proven that the proceedings of said court martial were laid before or submitted to the President of the United States for his confirmation or disapproval and orders in the case as required by said 65th Article of War.

7. The Court erred by not deciding that appellant has never been legally removed, dismissed, discharged or superseded as a Captain in the 13th Regiment of Infantry in the U. S. Army

8. The Court erred by not deciding that appellant is a Captain in the 13th Regiment of Infantry in the U S. Army and has been such Captain ever since May 14, 1862.

9. The Court erred by refusing to decide that the pay of a

Captain of Infantry in the U. S. Army from May 31, 1869, was and is

$1800 per year for his first term of five years' service.
$1980 per year for his second term of five years' service.
$2178 per year for his third term of five years' service.
$2395 80 per year for his fourth term of five years' service.
$2635.38 per year after his fourth term of five years' service.

10. The Court erred by refusing to decide that the United States is indebted to appellant for his pay as a Captain of Infantry for and during the period of six years next preceding the filing of his petition, to-wit: In the sum of $15,812 28 at the rate of $2,635.38 per year from Jan 4, 1883.

11. The Court erred by refusing to decide that the United States is indebted to appellant for his pay as a Captain in the Army from and after Jan. 4, 1889

12. The Court erred by refusing to decide that the proceedings of the court martial, the action of the Secretary of War thereon, and the order dismissing appellant were all made and had in time of peace.

13. The Court erred in that it did not award judgment in favor of the Appellant for the amount of his pay which accrued during the six years next preceeding the filing of his petition.

ARGUMENT.

POINT I.

THE CLAIMANT AND APPELLANT WAS NOT LEGALLY DISMISSED FROM THE SERVICE OF THE UNITED STATES, BUT IS STILL A CAPTAIN IN THE ARMY, AND ENTITLED TO RECEIVE PAY AS SUCH.

The proceedings, findings and sentence of the Court Martial by which he was sentenced to be dismissed, were never laid before, or submitted to the President, or passed upon by him.

The Act of July 13, 1866, Chap. 176, Sec. 5, v. 14, p. 92, provides as follows:

"And no officer in the military or naval service shall in the time of peace, be dismissed from the service, except upon and in pursuance of a sentence of a court-martial to that effect or in commutation thereof,"

U. S. Rev. Stat. Ed. of 1875, p. 215, Sec. 1,229, p. 239, Art. 99 of Sec. 1,342.

And the 65th Article of War, Act of April 10, 1806, Chap. 20. 2 Stat. 359–367 or

Story's Laws of U. S. Vol. 2; p. 1,000, Art. 65, which was in force when said court-martial was held, provides among other things:

"Neither shall any sentence of a general court martial in time of peace, extending to the loss of life, or the dismission of a commissioned officer * * * be carried into execution until after the whole proceedings shall have been transmitted to the

Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case." And see

U. S. Rev. Stat. (Ed. 1875), Sec. 1,342, Art. 106, p. 239.

Thus it appears that the sentence of a general court-martial in time of peace, to the effect that a commissioned officer be cashiered—dismissed from service—is inoperative, until approved by the President. Before then it is interlocutory and inchoate only.

Runkle vs. United States, 122 U. S. R. 543, 555.
Citing Mills vs. Martin, 19 Johns 7, 30.
Simmons on Court-Martial 6th Ed, Ch. XVII, p. 294.

As the sentence now under consideration involved the dismissal of Ide from the army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him.

The important question therefore is whether that approval has been positively shown.

The action required of the President is judicial, not administrative, it is his duty to review the proceedings of courts-martial in cases of this kind; he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect; he cannot delegate this power; his personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself; the judgment must be his own judgment and not that of another.

Runkle vs. United States, 122 U. S. R., 556-557.

And the fact that the President so acted must be shown positively, and not left to inference or argument only.

Ibid 556, 561.

Here it is not shown that the President so acted, or exercised his personal judgment. On the contrary the only possible inference is that the record was not submitted to him, and that he never acted upon it at all; but that the Secretary of War usurped the judicial function of the President, and, without authority, assumed to approve the proceedings, &c, and direct that the sentence be executed.

The language of the Secretary's order (Record p 5) is that the proceedings 'have been forwarded to the Secretary of War for the action of the President of the United States and * * * are approved, and the sentence will be duly executed.'

It does not state that the proceedings had been laid before, or submitted to the President, or that he had taken any action, or made any decision or order thereon, but purports to be, and doubtless was the act of the Secretary alone.

In this respect the appellant's case is stronger than was Runkle's, for in that case the decision says, p. 547:

"The President is pleased to remit all of the sentence (fine of "$750, imprisonment for four years and cashiering) except so "much thereof as directs cashiering, &c," thus necessarily implying that the record had been submitted to the President and that he had acted upon a part thereof; but this Court held that the proof was not sufficient to show that he had approved the sentence of dismissal, and therefor that Runkle had not been legally cashiered or dismissed.

It follows that the appellant was never legally dismissed from the army.

This case is also clearly distinguishable from

United States vs. Page, 137 U S R., 673, which in some respects is very like this.

There the Court of Claims attempted to follow the Runkle case and held that Lieut. Page had not been legally dismissed, and gave him judgment for $11,572 75 the amount of pay which accrued within the six years before the commencement of the suit.

But the record in that case shows that the proceedings of the court martial had not only been forwarded to the Secretary of War, but that he had submitted them to the President, and this Court in that particular, distinguished the case from Runkle's, and upon that ground solely, reversed the judgment of the Court of Claims, saying, 'it appeared that the proceedings had been forwarded to the Secretary of War, and by him submitted to the President;' p 679 'The Secretary declared he had submitted the proceedings in conformity with the 65th of the Rules and Articles of War;' p. 680. 'In Runkle vs. United States 122 U. S. 543 the record failed to show the vital fact of the submission of the proceedings to the President;' p. 680. 'The inference that the President had personally acted could, indeed, be properly drawn from the substantive fact of the submission of the proceedings to him, if that had appeared, but presumption could not supply that fact, &c.' p. 682.

So this Court reversed the judgment in favor of Page solely upon the ground that the record showed that the proceedings had been submitted to the President: but in this case that fact is not shown or stated, therefore the judgment herein should be reversed.

POINT II.

THE APPELLANT WAS NOT REMOVED FROM OR SUPERSEDED IN HIS OFFICE BY THE NOMINATION, OR APPOINTMENT OF ANY OTHER PERSON IN HIS PLACE.

The Secretary of War alleges in his letter of May 15, 1888, (Record p. 7) that the vacancy created by Ide's dismissal was filled by the transfer thereto on July 14, 1869, of Capt. Rankin who was discharged Dec. 31, 1870: this vacancy being filled 1871 by Capt. Bonney unassigned; who resigned April 1, 1872. and 1st Lieu Ellis was promoted to the vacancy and confirmed by

the Senate June 5, 1872, and the Secretary further says, 'the 'filling of the office by the confirmation of Ellis superseded the 'legal holder of the office at the time. Although the appoint-'ment of Ellis was vice Bonney it was nevertheless an appoint-'ment to the Captaincy in the 13th Infantry of which you were 'still in law the holder, and such appointment and confirmation 'operated to supersede you.'

Citing Blake vs. United States. 103 U. S. R., 227.

If this statement is correct it means that the promotion of Ellis displaced and superseded three Captains, viz: Ide, who had never been legally dismissed, Rankin who had been discharged, and Bonney who had resigned.

Neither Rankin nor Bonney superseded Ide for they were both Captains before he was court martialed. (Record pp. 6, 7).

Ide had not been dismissed, therefore there was no vacancy caused by his dismissal that could be filled by the transfer of Rankin or any one else to the 13th Regiment and the statement to that effect in the Secretary's letter is erroneous.

Ellis was promoted to the vacancy of Captain in the 13th Regiment caused by the resignation of Capt. Seth Bonney: that is the language of the record. (See record p 7.)

Ellis took Bonney's place and his only, he could not take Ide's place also, he could not be two Captains at once, nor fill the place of both Ide and Bonney at one and the same time: he was not promoted vice Ide dismissed: but vice Bonney resigned: Ide had not been dismissed, there was no vacancy in his office to be filled: it is absurd to say that the promotion of Ellis to fill the vacancy caused by Bonney's resignation, also filled Ide's place, which was not vacant

Again the Secretary says (Record p. 8)

'The vacancy created by your (Ide's) dismissal was filled by the transfer thereto of Capt. Wm. G. Rankin on July 14, 1869', and in the same letter he says that up to the time that Ellis was promoted to a Captaincy, June 8, 1872, Ide was still in law the holder of the office.

These statements cannot be reconciled; if Ide's place was filled by Rankin in July, 1869, he could not legally hold the office until Ellis was promoted in June, 1872, and if he was the legal holder of the office till June, 1872, then Rankin did not supersede him in 1869.

The assignment of Rankin to the 13th Infantry did not supersede Ide any more than it superseded any other Captain of that regiment; Ide had not been dismissed, but there was a vacancy in Company D and Rankin took command of that company, thereby filling the vacancy therein, which did not affect Ide's status as Captain of Company C.

But the truth is that neither Rankin, Bonney or Ellis ever filled Ide's place.

Ide was Captain of Company C (Record p 5).

Neither Rankin, Bonney or Ellis was ever Captain of Com-

pany C. but each of them was Captain of Company D (Record pp. 6, 7).

The only Captains of Company C since Ide's court-martial were Alfred L. Hough, Benjamin H Rogers and Henry C. Pratt (Rec. p. 7)

When they were not in command the company was commanded by one of its lieutenants.

None of these Captains was appointed in Ide's place or superseded him.

Hough was appointed Captain June 29, 1861, and so was senior Captain to Ide; he became unassigned by consolidation of Regiments; was assigned to the 13th in April, 1870, and promoted to be Major of the 22d in February, 1874 (Rec. p. 7).

Rogers was promoted April 13, 1874, to be Captain in the 13th to fill the vacancy caused by the promotion of Captain Alfred L. Hough to be Major of the 22d Infantry (Rec. p. 7).

Pratt was promoted to be Captain in the 13th to rank from June 10, 1876, to fill the vacancy caused by the promotion of Captain Robert Nugent, 13th Infantry, to be Major of the 24th Infantry (Rec. p. 7).

The War Department admits that the sentence of the court-martial was not submitted to the President or approved by him and that Ide continued to be a Captain until June 5, 1872, but claims that he was then displaced, removed or dismissed, not by the sentence, but without reference to it; in utter disregard and independently of it and arbitrarily by the promotion of Ellis vice Bonney, and to sustain this claim cites,

Blake vs. United States, 103, U. S. R., 227

but that case does not support the ruling of the Department.

The doctrine of that case so far as it is applicable is that 'The President has power to supersede or remove any officer of the army or navy by the appointment by and with the advice and consent of the Senate of his successor.'

The assignments of Captains Rankin, Bonney and Hough to the 13th Reg't. could not operate to remove or supersede Ide because they were already Captains when so assigned, and their several assignments were not appointments, 'by the President by and with the advice and consent of the Senate' or in any way whatever; they were mere orders of unassigned Captains to duty, pursuant to the consolidation order of March 11, 1869, (Rec. p. 6) with which the Senate had nothing to do, and for which its action was not necessary

Neither did the promotion of Ellis, Rogers or Pratt supersede or remove Ide; to work that result they must have been promoted to be Captain vice Ide; *eo nomine* or in such way as to designate with certainty that they took his place, but as has been already shown, and as appears from the record, such was not the case.

Ellis was promoted to fill the vacancy caused by Bonney's resignation: Rogers to fill the vacancy causes by Hough's pro

motion, and Pratt to fill the vacancy caused by the promotion of Nugent.

It is evident that the promotion of A to fill the vacancy caused by the resignation or promotion of B cannot supersede or remove C who is not mentioned.

The record shows that no one was ever appointed to succeed Ide, that he was never removed or superseded by the appointment of any one as his successor, either with or without the advice and consent of the Senate.

Before an Officer can be superseded or removed by appointment of the President and confirmation by the Senate, it must clearly appear that the President intended to and did appoint and that the Senate intended to and did advise and consent to the appointment of some other person as the successor or in the place of the officer to be superseded or removed.

This intent must be direct, unqualified and indisputable, not left to argument, inference, or implication any more than the approval by the President of a sentence of dismissal by a court-martial can be so left, as held in,

Runkle vs. United States cited ante.

But here there is no proof of any such intent: on the contrary the evidence negatives any such conclusion, and shows affirmatively that no such intent existed, that the authorities supposed Ide was dismissed by the sentence of the court-martial, and that there was never any intent to supersede, remove or dismiss him in any other way and that no new appointment was made to the office held by him.

The facts in the Blake case are so different from the facts here presented, that that case is worth nothing as a precedent in this.

Blake resigned, his resignation was accepted, Gilmore was nominated and appointed Post Chaplain, vice Blake resigned.

Here was an express intent to supersede Blake; to fill a vacancy caused by his resignation, he was specifically named, the action pointed directly to him, and could not affect any one else. But no such intent is shown or inferable against Captain Ide; the President has never by and with the advice and consent of the Senate, or in any way, appointed his successor.

If the President intended to supersede or remove him by appointing another person in his place by and with the advice and consent of the Senate; such appointment must be of such other person vice Ide *eo nomine*, removed, discharged, dismissed or superseded, as the case may be; or at least it must in some way directly specify or indicate that he is thereby removed or superseded. Nothing of that nature appears here, and we submit especially that the appointment or promotion of one officer in the place of another, who is specifically named, cannot remove or dismiss another officer who is not named.

Each officer is entitled to have his case decided by itself, and not held to be superseded, dismissed or removed by inference or implication, when his case was not under consideration, or

intended, or supposed to be affected, and his name was not mentioned.

In McElrath vs. United States, 102 U. S. R., 426.
Keys vs. United States, 109 U. S. R., 336.

The President nominated and by and with the advice and consent of the Senate appointed Haycock to be Lieutenant vice McElrath dismissed, and Goldman to be Lieutenant in place of Keys dismissed; here the dismissed officers were specifically named; the intent to fill their places was certain.

The cases do not sustain the proposition that Ide was ever legally dismissed, removed or superseded by any proceeding whatever.

It is apparent from the whole case that after the Secretary of War assumed to approve the proceedings and sentence of the court-martial and the illegal order of dismissal, based upon such unlawful approval was made, the appellant's name was dropped and he was not afterwards noticed or mentioned, doubtless upon the natural, but erroneous supposition that he had ceased to be an officer in the army.

The reason for this, and why no one was ever nominated or confirmed as his successor is obvious; while Capt. Ide's case was under consideration, the 45 infantry regiments were consolidated into 25; the effect was that a great many officers were left without commands and 'ordered to their homes to await further orders': and it was ordered that all vacancies that should occur in the 25 regiments should be filled by assignment from the senior officers of the same grade from the list of officers awaiting orders, and not by nomination and appointment by and with the advice and consent of the Senate. (Rec. p. 6)

Therefore when it was believed that Capt. Ide had ceased to be an officer, the supposed vacancy was filled by the assignment from another regiment of one of its Captains who had been sent home to await orders, but that did not supersede or remove Ide, or bring this case within the doctrine of

Blake vs. United States.

The subsequent promotion of lieutenants to fill the vacancies caused by the resignation, dismissal or promotion of Capts. Rankin, Bonney, Hough or Rogers, does not supersede or remove Ide who is not noticed or mentioned; but who was simply ignored and forgotten

But he was and still is a Captain in the army awaiting the decision of the President upon the proceedings and sentence of his court-martial, which decision has never been made but which he is entitled to by law, before he ceases to be an officer in the army.

The appellant is not responsible for and should not be prejudiced by the delay; it is not his fault that the President has neglected to render his decision, or that the Secretary of War exceeded his power; those officers were mistaken as to the law and did not act in accordance therewith: the fault is theirs, not his,

and surely he may be excused if he did not assume to correct their error, or know the law better than they did.

The fact is, and it is a part of the history of this case, and many others, that just at the time when the appellant was court-martialled and the infantry regiments were reduced in number, the authorities seized upon every pretext to reduce the number of officers to the number required for 25 regiments, and to get rid of those already in the service, which accounts, at least in part, for the unexampled and unjust severity of the court-martial in this case

POINT III.

IT WAS THE PLAINTIFF'S RIGHT, AND OF GREAT IMPORTANCE TO HIM, THAT THE RECORD OF THE COURT-MARTIAL SHOULD BE SUBMITTED TO AND PASSED ON BY THE PRESIDENT.

It appeared by the proceedings and record in the Court of Claims, and was there admitted, as we doubt not it will be here, that the plaintiff was in New York on recruiting service and that his fault consisted solely in not proceeding with due diligence to rejoin his regiment, after being ordered to do so; that he stopped in Buffalo to fulfil an engagement of a peculiarly delicate and personal character.

That he was in fault was not denied, but it was comparatively venial; he was not charged with peculation, fraud or any offense involving moral turpitude, or with conduct unbecoming an officer and gentleman; the sentence of the court-martial was unusually severe, and we think unjust; it is doubted whether so severe a punishment was ever before inflicted for so slight an offense

If the record had been submitted to the President, it may well be that he would have modified the sentence to the usual one in such cases of suspension for a time, with suspension of pay, &c., pursuant to the 101st Article of War.

U. S. Rev. Stat. (1875) p. 239, Sec 101

By the non-submission the plaintiff lost all chance of executive clemency, and by the illegal act of the Secretary of War he lost much more; he had served in the army with credit and honor from May, 1861, all through the war; he lost not only his pay and his rights to promotion, but his good name and reputation; he was dishonorably dismissed from the service, his name tarnished, his reputation destroyed and he has lived ever since under the cloud and disgrace of his dismissal, which has broken his life and ruined his prospects, simply because for personal and peculiar reasons he stayed a few days longer in Buffalo than he should have done, on his way to rejoin his regiment.

And all this has happened because the Secretary of War, one of the highest officials of defendant, violated the law, usurped the powers of the President, and illegally assumed to pass upon the plaintiff's case, without submitting it to the President; in so doing the Secretary was a greater offender than the plaintiff, who ought not to suffer for the others' fault.

POINT IV.

THE APPELLANT HAS NOT BEEN GUILTY OF SUCH LACHES AS WARRANTS THE DISMISSAL OF HIS RETITION, AT LEAST AS TO THE WHOLE AMOUNT OF HIS CLAIM.

The Court of Claims dismissed the petition solely upon the ground of plaintiff's laches.

Neither laches nor the Statute of Limitations is pleaded (see Traverse, Record p. 4), and as a general rule they must be pleeded to be available.

Sheperd vs. Pepper, 133 U. S. R., 626.
Gornsly vs. Bunyan, 138 U. S R., 623.

But as this rule, so far as the Statute of Limitations is concerned, does not apply to cases against the United States in the Court of Claims.

Fin vs. United States, 123 U S. R., 227.

It follows that claimant's recovery must be limited to so much of his salary as accrued within the six years next preceding the filing of his petition, which was the rule adopted by the Court of Claims in

Page vs. United States, 137 U. S. R., 673,

and the question therefore is whether claimant has been guilty of such laches as rightfully to bar a recovery of that part of his pay.

1. The defence should not prevail because it is not pleaded.

2. In so holding the Court of Claims has been inconsistent with its decision in the Page case, for therein, it gave judgment for plaintiff for the amount due within the Statute of Limitation, although he was tried by court martial and dismissed from the service May 27, 1874, and claimed to recover pay from that date, but did not file his petition until August 31, 1887, more than 13 years after his dismissal: if Ide is guilty of laches, Page was, but the Court of Claims takes no notice of laches in the Page case and gives him judgment, but applies it with rigor in this case and denies relief.

Laches is defined as follows:

Such neglect or omission to assert a right as taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party operates as a bar in a Court of Equity.

Am. & Eng. Encyc. of Law, Vol. 12, p. 533.

and see Bouvier's Law Dict., Vol. 2, Title Laches.

There is no fixed time or degree of laches, short of a Statute of Limitations which will preclude the assertion of a party's rights, the courts exercise a large discretion, depending upon the facts, and have sometimes given relief, notwithstanding great delay.

Bollinger vs. Chouteau, 20 Mo. 89.
Obert vs Obert, 12 N. J. Eq., 423.
Ayletts Exrs. vs. King, 11 Leigh, (Va)., 486.
Earl Beauchamp vs. Winn, 6 H. L., 223.

Morse vs. Royal, 12 Vesey, 335.
Twin Lick Oil Co vs. Marburn, 91 U. S. R., 587.
Brown vs. Buena Vista Co., 95 U. S. R., 157.
Sullivan vs. P. & K. R. R Co., 94 U. S. R., 806.

So long as the relative position of the parties is not altered to the defendants' prejudice, delay is of very little consequence.

Nudd vs. Powers, 136 Mass., 273.
Daggers vs. Van Dyck, 37 N. J. Eq., 130.
Platt vs. Platt, 58 N. Y. R., 646.
Wollaston vs. Tribe, L. R., 9 Eq., 44, 50.
Ex parte Adamson, L. R., 8 Ch. Div., 809, 817.
Ridgway vs. Newstead, 3 DeG., F. & J., 474, 485.
Lindsay Pet. Co. vs. Hurd, L. R., 5 P. C., 221.
King vs. Anderson, I. R., 8 Eq., 625

Nobody should be estopped from averring the truth or asserting a just demand, unless by his own acts, words or neglect, the demand would work some wrong to some other person who has been induced to do something or refrain from doing something by reason of what he has said or done or omitted to say or do.

Per James J. in ex parte Adamson ante.

It is only when the complainant has slept so long that great and serious wrong will be done to defendant, that laches constitute a complete defense.

Daggers vs. Van Dyck, 37 N. J. Eq. 130.

In this case the plaintiff's delay has not prejudiced the defendant, nor has it done anything or refrained from doing anything by reason of what the plaintiff has said or done or omitted to say or do

When a delay of thirteen years has occurred but the evidence in support of the claim was entirely documentary, and there has been no change in the situation of the parties, held that the claim was not barred, it being governed by purely equitable rules and not affected by the analogy of the Statute.

Cranmer vs. McSword, 24 W. Va., 594, 601.

Here the evidence to support the claim is entirely documentary and there has been no change prejudicial to the defendant.

When the claim is within a statutory limitation, laches to bar the right to prosecute it, short of the time fixed by the Statute, must be such as to work an equitable estoppel

Scherer vs. Ingerman, 110 Ind., 428.

In such a case the respondent must in addition to the delay have been prejudiced thereby.

Gibbons vs. Hoag, 95 Ill., 45.
Scherer vs. Ingerman, 110 Ind., 425.
Kline vs. Vogel, 90 Mo., 239.
Coles Admrs. vs. Ballard 78 Va., 139
Forters Curator vs. Rison 17 Grat., (Va)., 321, 325.

But the United States has not been damaged or prejudiced by the plaintiff's delay, nor is there anything in the case to work an estoppel.

The doctrine of laches was established before statutes of limitations were passed, but now

There is no force in the common law doctrine of the reluctance of courts to enforce stale demands, all the principles of this doctrine are merged in the Statutes of Limitations, and it furnishes the rule by which courts act.

Kincaid vs. Richardson, 9 Abbott New Cases (N. Y). 315, 321.

In common law action the courts are bound by the Statute of Limitations, and it must be a very strong and peculiar case of laches that will defeat a plaintiffs recovery, when the time prescribed by Statute has not expired. the delay must amount to an estoppel, which is a different thing from laches.

But in cases of equitable cognizance, especially when there is no strict Statute. the Courts are not bound by any rigid cast iron rule but will grant or refuse relief according to the circumstances of each case, sometimes awarding it when there has been great delay, if the rights of other parties have not be prejudiced, and sometimes refusing it, even where the delay has been but brief, if it has been such as to wrongfully or injuriously affect the rights of others.

Equity will not refuse to enforce an obligation merely because of the lapse of time, unless evidence has been lost, or the rights of third parties have been involved, or the personal relations of the parties have become so much altered as to change the essential character of the obligation. Governments and municipal corporations are of such a permanent nature that their mutual relations are presumably unaffected by the lapse of years.

United States vs. Alexandria et al., 19 Fed. Rep., 609.

So the United States is of such a permanent nature that it could not be affected by plaintiff's delay.

This is a common law action to recover arrears of salary; the time during which salary was not paid includes more than six years next preceding the commencement of the action, and the Statute of Limitations applies to a demand of this nature.

U. S. Rev. Stat of 1875, p. 197, Sec. 1069.

But it is a continuing obligation, viz: To pay a certain annual salary in monthly payments, and the breaches have been successive and continuous, to-wit: A failure at the end of each and every month to pay the salary then falling due.

When the obligation is a continuing one there can be no laches by plaintiff until there is a breach.

Middleton vs Newport Hospital, R. I., 15 Atl. R., 800.

Denham vs. Watson, 24 Neb., 779

and when the right or obligation is continuing and the breaches are continuous, each successive breach creates a new cause of action, which is not barred by the plaintiff's laches in not prosecuting for former breaches.

Galway vs. Manhattan, E. R Co., 35 N. Y. State Rep. 628

Affirmed in N Y. Court of App, 40 N. Y. State Rep, 145, 128 N. Y. Reports, 132 and 44 Albany Law Journal, 434.

Arnold vs Hudson R. R R. Co., 55 N. Y, 661.

Silsby Mfg. Co. vs. State of N. Y., 104 N. Y., 562, 569.

Cobrick vs Swinborne, 105 N. Y., 503.

Wright vs S. B. & N. Y. R. R. Co., 49 Hun., (N. Y)., 445, 449.

Reed vs State of New York, 108 N. Y., 407, 414.

Folts vs State of New York, 118 N. Y., 406, 409.

When a Statute plainly prescribes the time within which a thing may be done, it is not laches to move even at the latest day, when no intervening facts render it unconscionable for the application to be granted

Marvin vs Brand, 56 Hun (N. Y.), 242, 246-7.

Although the above cited cases do not arise on contract, we submit that the rule is the same and see post.

The plaintiff could not maintain an action to recover any sum before it was due, he has no right of action until then.

The time when the cause of action accrues and the Statute begins to run, is when a party has a right of action against another.

Astor vs Girard, 4 Wash., 711.

Mere delay on the part of plaintiffs in asserting their rights when the action was begun within the time limited, and when defendant has not been prejudiced by the delay, will not defeat the action.

McMurry vs McMurry, 66 N. Y., 175, 181.

When a legal right is involved, and upon equitable grounds the courts have been called on to sustain the legal right, the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense.

Galway vs. M. E R. W. Co., 128 N. Y., 132, 152, 3, 4, 5, citing.

Menendez vs. Holt 128 U. S., 514, 523.

Laches does not, like limitation, grow out of the mere passage of time, but it is founded upon the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property or parties

Galliher vs. Cadwell, 145 U. S R., 368.

Here there is no such change or inequity.

Mere delay or acquiescence cannot defeat the remedy in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself.

Menendez vs. Holt, 128 U. S., 514, 523.

The question of laches and staleness of claim virtually falls with that of the defense of the Statute of Limitations. So long as the demands secured are not barred by the Statute there can be no laches in prosecuting a suit to enforce those demands

Cross vs. Allen, 141 U. S. R, 528, 537.

There are no circumstances amounting to an estoppel. The demands that accrued within the six years next prior to filing the petition are not barred by the Statute, therefore there is no *laches* to defeat a recovery for them.

The Statute only bars the plaintiff's right to recover so much of his claim as accrued more than six years prior to bringing his action.

He is entitled to recover so much thereof as became due within said six years.

And he may by another suit recover what falls due after the commencement of this action.

His salary was payable for each year, in monthly payments and is precisely like every continuing obligation when money becomes due by installments; in all such cases the Statute runs against each installment from the day it falls due and the fact that one or more of the installments first to be paid are barred by the Statute will not defeat a recovery for other installments which fall due afterwards and within the six years next preceding the beginning of the suit.

Wood on Limitations, Secs. 120, 125, 151.
Bush vs Stowell, 71 Penn. St, 208.
Burnham vs Brown, 23 Maine, 400.
Evans Pothier, 404.
Heywood vs. Perrin, 10 Pick'g, (Mass)., 228.
Tucker vs Randall, 2 Mass., 283.
Estabrook vs Molton, 9 Mass, 258.
Baltimore T. Co. vs. Barnes 6 H. & J, (Ind)., 57.
Clark vs Iowa City, 20 Wallace, (U. S), 583.
Amy vs. Dubuque, 98 U. S. R, 470.
Robertson vs. Pickerel, 77 N. C., 303.
Raynor vs. Robinson, 36 Barb., (N. Y), 128, 136.
Davis vs. Gorton, 16 N. Y, 255.
Rector vs. Vanderbilt, 98 N. Y, 170, 175-6.

and the rule is the same when plaintiff seeks to recover the amount due for continuing services.

Wood on Limitation of Actions, p. 268, Sec. 120 and cases there cited.
Carr vs. Thompson, 87 N. Y., 160.
In re Gardner, 103 N. Y., 533
Gilbert vs. Comstock, 93 N. Y, 484.

Part payment of an annuity within six years takes the case out of the Statute, as to all installments that fell due within the six years next preceding such payment

Mensch vs. Mensch, 2 Lansing, (N. Y)., 235.

For instance plaintiff's salary for Dec., 1888, was not due till Dec. 31, 1888, and he could not sue for it before Jan. 1, 1889; he began his suit Jan. 4, 1889; surely there is no laches here, and in such a case as this laches will not be imputed by reason of delay for any less time than that prescribed by the Statute of Limitations

It is absurd to say that plaintiff was guilty of laches for not enforcing his claim before he had a right to enforce it; before his cause of action accrued.

The rule adopted in the Court of Claims in

United States vs. Page, 137 U. S. R., 673

is correct, so far as it applies the Statute of Limitations and limits the recovery to the salary, which accrued within six years, and this Court finds no fault with the decision in that particular, but reverses the judgment solely upon the ground that the plaintiff was not entitled to recover anything, and for a reason, and upon a fact, which do not exist in this case as is hereinbefore shown.

Plaintiff's delay has not worked any wrong damage or prejudice to the defendant; he alone has been the sufferer, the relative situation of the parties are not changed, no evidence has been, or can be lost, it is all documentary; no rights of third parties have become involved or can be affected; nothing has occurred to create an estoppel; no reason exists why the doctrine of laches should be applied

The Statute of Limitations deprives plaintiff of all his pay except that which accrued within the six years next preceding the filing of the petition; surely that is punishment enough for the offense of which he was found guilty.

And instead of defendant having been prejudiced by the delay, it has been benefited by it, by being relieved from the payment of so much of plaintiff's salary as is barred by the Statute, being over $30,000.00.

POINT V.

THE COURT OF CLAIMS SAYS THAT THERE IS A DIFFERENCE IN THE PHRASEOLOGY OF THE ENDORSEMENT OF SECRETARY RAWLINS IN THIS CASE AND THAT OF SECRETARY BELKNAP IN RUNKLE'S, BUT DECLINES TO EXPRESS ANY OPINION AS TO WHETHER THEY ARE ALIKE IN LEGAL EFFECT (Record p. 9).

We submit that the phraseology in this case is much stronger against the defendant than it was in Runkle's.

There is nothing here which in any way suggests or intimates that the record, etc., was ever submitted to the President, or that the approval was the act of any one but the Secretary, while in Runkle's case it clearly appears that the President had examined and passed upon a part of the record at least

A comparison of the two indorsements is all that is needed to sustain this point.

Runkle vs. U. S., 122 U. S. R., 543, 547.
Ide vs. U. S., printed record, p. 5.

Again the Court of Claims erred by deciding that:

In time of peace at least an officer is not obliged to obey an illegal order (Record p. 9).

THIRD SPECIFICATION OF ERROR.

Who is to judge its illegality? General Sherman ordered that plaintiff be dismissed, how was he to resist or disobey this order? How could he retain his place after that order was issued? How was he to know that this order was illegal?

It was not an illegal order, in the sense that no such order could properly be issued by any one; it would have been legal if the President had approved the sentence; General Sherman had the authority of the Secretary of War for it; the plaintiff could not resist the Secretary and General, he had the right to believe, and did believe, that the President had approved the sentence, and that the order was legal; acting upon that mistake he submitted, and it was not until just before he brought this action that he discovered his error.

The Court also erred by deciding that the appellant was in fault in not rendering services, and in so holding on the ground that the order discharging him from service was illegal, as to his removal from office.

Again the Court of Claims asserts (Rec. p. 10) that the plaintiff seeks to excuse his delay, "because he was ignorant of the law," until the decision of the Runkle case in 1887, and then very properly says, he was bound to know the law; granted; it is a broad presumption, it seems that Secretary Rawlins and General Sherman did not know the law, it may be inferred that the President did not know it, and that none of his advisers or government officials knew it, or they would not have violated it. The Court of Claims did not know it, for it decided adversely to Runkle and again in favor of Page, and this Court reversed both those decisions but a poor Captain on outpost duty in Montana was bound to know it, and must suffer because he did not, yet such is the law and we do not attempt to deny it.

We did not make any such claim, our claim was and is that the plaintiff was excusable, not because he was mistaken as to the law, but because he was ignorant of the fact, that the proceedings of the court martial had not been submitted to and passed on by the President, thus his mistake was of fact, and not of law, and should excuse his delay, if any excuse is needed.

Platt vs Platt, 58 N. Y. R., 646.

The Court of Claims bases its decision (Record pp. 9 10), partly upon another ground saying:

"Whether the complainant was dismissed rightfully or wrongfully, the fact remains that he was *de facto* out of the army, and some other officer was required to perform the active duties belonging to the office from which he was dismissed; and is he entitled to recover salary of an office, the duties of which he never performed for eighteen years, and never offered to perform during that period, and which were discharged by some other officer?"

It is evident that the plaintiff was wrongfully dismissed; therefore while by the wrongful act of the government and his supe-

rior officers he was *de facto* out of the army, yet he was all the time *de jure* in the army and entitled to his pay.

That plaintiff did not perform the duties of his office and that some other officer did, was not his fault, but the fault of the Secretary of War, for which the claimant should not suffer.

Neither should plaintiff be blamed or denied relief, because he did not offer to perform duty after his illegal dismissal.

The legal situation was this: the court-martial sentenced him to be dismissed, the proceedings were forwarded to the Secretary of War, but were not submitted to the President, they are still awaiting his action, the plaintiff is also waiting to know the result, he is an officer sentenced to dismissal but whose sentence has not yet become operative, he is theoretically suspended from duty and under arrest until the President's decision; and in the interim between the sentence and decision he cannot perform any duties; it is useless for him to offer to do duty, his offer so to do would be a breach of discipline and work no good result.

An officer not having orders from competent authority cannot put himself on duty by virtue of his commission alone.

Revised U. S Army Reg of 1861, Art. 2., Sec. 8 of Rank & Comm'd.

The authorities have had the right at all times to order him to duty; if they had done so he would have obeyed; that they have not done so is their own fault, and no officer should be blamed and made to suffer because he has not done duty so long as he has not been ordered to duty, but has been relieved therefrom.

The United States has suffered no loss by reason of Ide's duties having been performed by other officers:

1. He had no duty to perform, unless he was ordered to duty.

2. A large number of supernumerary officers were awaiting orders; some of them performed his duty; it makes no difference to the United States which one was a supernumerary, or which one performed the duty, Ide or the other.

POINT VI.

The Judgment of the Court of Claims should be reversed and judgment directed for the plaintiff for his pay as Captain in the army during the six years next preceding the filing of his petition, to-wit: From January 4, 1883, to January 4, 1889, at the rate of $2,635.38 per year, amounting to $15,812 28 as fixed by law.

U. S. Rev. Stat. of 1875, p. 219, Sec. 1261, 1262.
United States vs. Tyler, 105 U. S. R., 244, 246.

GEORGE WADSWORTH,
Attorney and of Counsel for Appellant,
Buffalo, N. Y.

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Office Supreme Court U. S.
FILED.
DEC 9 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

WILLIAM C. IDE,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

It is well settled, that a party who awaits the final result of a pending litigation before beginning his action, is not guilty of laches when that litigation will determine the validity or invalidity of his claim.

In this case the litigation concerning plaintiff's rights is still pending; he has been awaiting the final decision; the President has not yet decided; the case is still before him; he may at any time approve, disapprove, or modify the proceedings and sentence of the court martial.

Therefore, plaintiff is not guilty of laches.

II.

There is a marked distinction between this case and that of Fletcher *vs.* United States, 148 U. S., 84. It appears by

the record here, p. 5, Finding I, that John A. Rawlins, then Secretary of War, made the order endorsed on the proceedings of the court martial, and that finding is to the effect that the order was the order of the Secretary and not of the President.

Again, by the last clause of said second finding the Court of Claims found that "The President never confirmed nor "disapproved the proceedings of said court martial nor took "any action thereon, nor made any orders in the case, unless "he did so by some of the facts herein stated." As the record does not state that the President did anything whatever, these findings amount to an affirmative finding by the court below that the President did not affirm or approve the proceedings and sentence of the court martial, and such finding of the Court of Claims is conclusive.

This court, therefore, cannot find or decide that the President did approve said proceedings or sentence.

There is no such finding in the Fletcher case, as that above cited, from this.

III.

Therefore, this case falls within and is governed by the rule in Runkle *vs.* United States, 122 U. S., 547, that the record must show positively that the approval was the act of the President himself, and such necessary fact cannot be left to, or sustained by, argument or inference only.

So far as anything on this point is shown by this record, it is that the President did not act. The findings are to that effect, and preclude any inferences to the contrary.

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Office Supreme Court U. S.
FILED.
DEC 4 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM C. IDE, APPELLANT,
v.
THE UNITED STATES, RESPONDENTS. } No. 155.

BRIEF FOR THE RESPONDENTS.

GEORGE H. GORMAN,
Assistant Attorney.
J. E. DODGE,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM C. IDE, APPELLANT,
v.
THE UNITED STATES, RESPONDENTS. } No. 155.

BRIEF FOR THE RESPONDENTS.

STATEMENT.

This is an action for the recovery of $44,897, alleged to be due from the respondents to the appellant as his salary as captain in the Thirteenth United States Infantry from May 1, 1869, to November 1, 1888.

The case came on to be heard in the Court of Claims, and on May 26, 1890, judgment was rendered by said court in favor of defendant and against the appellant, from which the claimant appeals.

The facts, as found by the Court of Claims, are set out in full on pages 4–8 of the transcript of the record.

Such facts as appear to be pertinent to the issues involved in this appeal may be briefly and comprehensively recited as follows:

On August 17, 1861, appellant was appointed and commissioned first lieutenant in Thirteenth Infantry. Promoted to be captain of Company C, in said regiment, July 2, 1862. In March, 1869, he was tried by a general court-martial upon certain charges, found guilty, and sentenced "to be dismissed the service of the United States." The findings of the court were approved (May 12, 1869) by the general commanding the department and by him forwarded to the Secretary of War, who indorsed the same, as shown on page 5 of the record. Appellant has been *de facto* out of the Army since May 31, 1869. He has never been placed upon the retired list. Since May 31, 1869, appellant has not performed, or offered to perform, any military duty whatsoever; nor has he ever appealed from, or in any manner sought to avoid, the sentence of the court-martial aforesaid, until April 4, 1888. (See record, p. 7.) During all this time the duties of the office of captain (Thirteenth United States troops) have been continuously performed by other persons, whom the respondents have regularly paid therefor. The appellant was paid his salary to May 31, 1869. He has not been paid since, nor did he ever demand payment until November 20, 1888, a period of more than eighteen years.

Under the act of March 11, 1869, the infantry of the army was consolidated, as shown on pages 6 and 7 of the record herein, which resulted in the appointment by the President of Phillip H. Ellis as captain in the Thirteenth

Infantry, *vice* Bonny, resigned. This appointment was confirmed by the Senate, June 5, 1872, and Captain Ellis has since commanded said company.

ARGUMENT.

I.

It is contended on behalf of the appellant that the sentence of the court-marshal dismissing him from the service of the United States was inoperative because the same was never approved by the President. There is nothing whatever in the findings of the Court of Claims relative to the proper creation of or errors committed by the said court-martial, and no such questions can arise in this appeal, nor can such questions be raised in an action for the recovery of salary. *U. S.* v. *Fletcher*, 148 U. S., 84. The sole ground upon which the contention of the appellant rests is the allegation that the said sentence was not approved by the President. In support of this contention the appellant relies upon the provisions of the Sixty-fifth Article of War and the construction placed thereon by this court in the *Runkles case* (122 U. S., 543).

The sixty-fifth Article of War (2 Stats., 367, c. 29) provides as follows:

> * * * But no sentence of a court-martial shall be carried into execution until after the whole proceeding shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to loss of life or the dismissal of a commissioned offi-

> cer, be carried into execution until after the whole proceeding shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case.

In considering this provision, Chief Justice Waite, for the court, in *Runkle* v. *United States*, *supra*, decided that the law required that the sentence of a general court-martial should be approved by the President in order to make it effectual; and that until such approval the sentence is interlocutory and inchoate only.

In answer to the contention made by the appellant under this head we say:

First. That the sentence of the court-martial in the case at bar *was* approved by the President, as required by the sixty-fifth Article of War and under the rule in Runkle's case, *supra*.

William C. Ide, the claimant, was appointed July 2, 1862, a captain in the Thirteenth Regiment of Infantry, U. S. Army, to rank as such from May 14, 1862. In March, 1869, he was tried by a general court-martial, was found guilty on the charges preferred, and was sentenced "to be dismissed the service of the United States."

The sentence was approved by Gen. Terry, the commander of the department, and the record forwarded to the Secretary of War.

May 12, 1869, Secretary Rawlins issued an order as follows:

> In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case of Bvt. Maj. William

> C. Ide, captain Thirteenth Infantry, have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved, and the sentence will be duly executed. (See Record, p. 5.)

Here is an order from an eminent Cabinet officer (who is not only presumed to know the law, but who actually did know it and states that his action is in conformity with it) which recites that the proceedings of the court-martial in this case "*have been*" (past tense) "forwarded to the Secretary of War for the action of the President of the United States, and" [the President having considered the same] "the proceedings, findings, and sentence are approved and the sentence will be duly executed." Secretary Rawlins knew very well that *he* had no power to approve the sentence, and was fully aware that the law required the approval of the President. When, therefore, he says that the proceedings "have been forwarded to the Secretary of War *for the action* of the *President of the United States and* the proceedings, findings, and sentence are *approved*," he manifestly means to say and does say in plain and unambiguous language that they are approved by the President, which said approval is now publicly announced by the head of the proper Department.

> There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate Executive Department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promul-

> gated in the regular course of business, are presumptively *his* acts. This has been many times decided by this court.

Runkle's Case, 122 U. S., 543, 557, per Waite, C. J., citing:

> *Wilcox* v. *Jackson*, 13 Peters, 498–513.
> *United States* v. *Eliason*, 16 Peters, 291, 302.
> *Confiscation Cases*, 20 Wall., 92, 109.
> *United States* v. *Farden*, 99 U. S., 10, 19.
> *Wolsey* v. *Chapman*, 101 U. S., 755, 769.

And in Runkle's case, *supra*, the court did not decide, but, on the contrary, expressly refrained from deciding that the President's approval should be put in any particular form, or should be attested by his own signature. They merely held that he must approve, and that the fact of his approval must be capable of ascertainment otherwise than by argument or inference; that the fact of his approval must be manifested in such a way as to render it capable of being identified as *his* act, and not as a mere departmental order. (See p. 561 of opinion.)

It is submitted that the approval in the case at bar fully meets the above requirements. Certainly no argument or inference is required to ascertain the meaning of the clear and explicit order of Secretary Rawlins, set forth above. Certainly it can not be contended that this is a "mere departmental order" in view of the language used by the Secretary of War. The Secretary might have added the words "by the President of the United States," after the word "approved," and have made his order read thus:

> In conformity with the sixty-fifth of the rules of the Articles of War, the proceedings of the general

> court-martial in the foregoing case of Bvt. Maj. William C. Ide, captain Thirteenth Infantry, have been forwarded to the Secretary War for the action of the President of the United States, and the proceedings, findings, and sentence are approved by the President of the United States.

But by so doing the Secretary would have written a very inelegant and tautological sentence without conveying one whit more of information than is expressed by the sentence without this redundant addition.

It is unnecessary, however, to argue the point further, inasmuch as it settled by the decision of this court in Fletcher's Case, 148 U. S., 84, decided at the last term.

The order made by the Secretary of War in that case was as follows:

> In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, finding, and sentence are approved, and the sentence will be duly executed.

It was contended that this order was insufficient, in that it did not show the approval of the President. But Mr. Chief Justice Fuller, speaking for the Court, says (p. 89):

> While in the case in hand it is not said that the proceedings were submitted to the President, it is stated that they had *been* forwarded to the Secretary of War for the action of the President, and as that is followed by an approval and the direction of the execution of the sentence, which approval and sentence could only eminate from the President, the conclusion follows that the action taken was the action of the President.

It will be observed that the order of the Secretary of War is identical with that in the case at bar. The decision, therefore, is conclusive in favor of the respondents.

Second. It is further submitted that, even if it be conceded that the approval of the President in the case at bar was not had in the manner required by law, the appellant himself has approved of and acquiesced in the sentence of the court-martial for a period of more than eighteen years, during all which time the appellant neither performed nor offered to perform any military service whatsoever, and permitted the duties of the office to which he now lays claim to be performed by another without protest, and that other person to be paid therefor by this respondent. Having failed for eighteen years to speak when he ought to have spoken, he can not now speak when he ought to be silent. He has slept upon his rights (if he had any) for eighteen years. He has stood silently by and permitted this respondent to expend thousands of dollars in payment for the very services which (according to his contention) should have been performed by him, and after his Rip Van Winkle slumber he now seeks, upon a technical quibble, to recover pay for eighteen years of idleness.

The doctrine laid down in Runkle's Case, *supra*, was never intended to apply to such a case as this. The facts in the two cases are so widely and radically different that the Runkle Case can not be regarded as a precedent for any other, as is very clearly intimated by this court in Fletcher's Case, 148 U. S., 84. In elaboration of this point, we can not do better than to invite the attention of

the court to the language of Richardson, Ch. J., who delivered the opinion in the court below:

> If this case were identical with the Runkle case and involved only the question of the illegality of the action taken upon the findings and sentence of the court-martial dismissing the claimant from the service, his contention would be correct. The phraseology of the indorsement by Secretary Rawlins in this case and that of Secretary Belknap in Runkle's case are not the same, and as to whether they are alike in legal effect we express no opinion. There are other material differences between the two cases which have an important bearing on our decision.
>
> In time of peace, at least, an officer is not obliged to obey an illegal order. If such an order dismissing a subordinate from office be issued by a superior, but not by the highest officer in authority, the subordinate is not left without some obligations resting upon him. It becomes his duty at once, or within a reasonable time, to appeal to the highest authority for revocation, modification, or correction of the illegal order. If he obeys and submits to the order without appeal and without objection for an unreasonable length of time he must be held to have abandoned all title and claim to the office and to its emoluments and to have waived his right to both.
>
> The claimant was dismissed during the early part of the first administration of President Grant, while General Rawlins was Secretary of War. Had he appealed to President Grant at any time during the more than three years remaining of his then term of the Presidency, or during the four years of his second term, the error, if any there were, could have been corrected. But he allowed President Grant's two terms, and the terms of his three immediate successors (Hayes, Garfield, and Arthur), to expire with-

out making appeal to either of them. Seven Secretaries of War, after Secretary Rawlins, came and went without any complaint from the claimant (Sherman, Belknap, Taft, Cameron, McCrary, Ramsey, and Lincoln).

It was more than eighteen years after his dismissal before he attempted to assert any right to the office, or any claim to the salary, and he made no effort anywhere to obtain possession of the office from which he alleges he was illegally dismissed. During the whole time he performed no official service and offered to perform none. Therein his case differs materially from that of Runkle. Referring to the order of Secretary Belknap in Runkle's case the Supreme Court say:

"After this order was issued, *but on the same day*, Runkle presented to President Grant a petition setting forth among other things, 'that the proceedings of said court had not been approved by the President of the United States as required by law.' This petition was not only received by President Grant, but it was by him referred to the Judge-Advocate-General for 'review' and report. Upon this reference the Judge-Advocate-General acted and reported on the whole case. President Grant did nothing further in the premises, and the matter remained open when President Hayes came into office."

Thus Runkle early and at once asserted his right to the office and kept the question open and before the Executive until it was taken up and decided in his favor four years thereafter. He did nothing from which an abandonment of the office could be inferred, for he was upon the retired list and was subject to no duty.

It is said that the claimant submitted to the order dismissing him and made no appeal to the President for eighteen years, because he was ignorant of the law until

the decision of the Runkle case in 1887. But he was bound to know the law. *Ignorantia legis neminem excusat.* The law has been upon the statute book since 1802 in substantially the same language as it appeared when he was dismissed (act of 1802, March 16, chap. 9, sec. 10, 2 Stat. L., 134), and it was included among the Articles of War enacted in 1806 (act of 1806, chap. 20, art. 65, 2 Stat. L., 367).

By the decision in Runkle's case the Supreme Court did not *make* the law; they only threw judicial light upon what had been the law for more than eighty years, as everybody was bound to know.

Runkle knew the law and acted upon that knowledge with vigilance. Thus he waived no rights and lost none. Besides, unlike the claimant, he was upon the retired list, with no duties to perform, and, while his name was not on the Army Register, no other officer took his place.

The fact that this is not an action directly to regain possession of an office must not be lost sight of. That issue can not be tried in this court. Whether the claimant was dismissed rightfully or wrongfully, the fact remains that he was *de jacto* out of the Army and some other officer was required to perform the active duties belonging to the office from which he was dismissed.

The Government is not responsible for the consequences of illegal orders of subordinate military officers, acquiesced in for an unreasonable length of time by the aggrieved party without appeal to the highest authority.

It is believed that, under the facts here disclosed, the appellant is estopped from asserting this claim.

(*a*) He is estopped by reason of his negligent conduct.

On page 654 of Bigelow on Estoppel (5 Ed.) the learned author says:

> Let it be supposed that a man has been fixed with constructive notice [appellant had actual notice] which, by reason of his negligence, has not become knowledge to him, of the existence of some right in his favor; that this right is, to his knowledge, about being disposed of by another as that person's property; and that it is so disposed of to a purchaser for value without notice of the right and in the absence of the negligent party. Here would be a case of negligence which could hardly be treated upon the footing of a representation; but would not an estoppel arise, supposing the other elements of it present? The negligence would seem to possess all the characteristic of negligence having legal consequence.

The "other elements" referred to are—

First. The negligence of the party sought to be estopped must have been the proximate cause of the change of position by the party alleging the estoppel. (Had appellant successfully asserted his right to this office, respondent would not have employed another to perform its duties and paid him therefor.)

Second. The negligent person must at the time owe some duty either to the person affected by the alleged negligence or to the public, of which he is one. (Appellant, like all creditors, owed a duty to demand payment from his debtor within a reasonable time, and to prevent payment to the wrong person when he knew such payments were being made.)

An examination of the facts of this case will, it is believed, show it to be fully covered by the case put by

Mr. Bigelow. Appellant knew of the existence of this right. He is conclusively presumed to know the law. But, even if he were not, his want of knowledge was caused by his own culpable negligence. This law has been in existence since 1802, and was included among the articles of war enacted in 1806. The decision in Runkle's case did not *make* the law. He stood by and permitted his right to this office to be disposed of by the Government as its own, and it was so disposed of, in his absence, to an innocent third person.

The analogy is complete.

(*b*) Having acquiesced in the judgment of the court-martial for a period of eighteen years, appellant will be held to have waived whatever rights he may have had and can not now be heard to assert them.

As to acquiescence see:

Frick v. *Trustees*, 99 Ill., 167, 169.
Burk v. *Simonson*, 104 Ind., 173, 175.
Perry v. *Cheboygan*, 55 Mich., 250, 255.
Kimball v. *Lee*, 40 N. J. Eq., 403.
Allen v. *McKean*, 1 Sumn., 314, Story, J.
Pence v. *Langdon*, 99 U. S., 578, 581.
Matthews v. *Murchison*, 17 Fed. Rep., 766.

On the question of waiver, Mr. Justice Strong, in *Shutte* v. *Thompson* (15 Wall., 151, 159), says:

> A party may waive any provision, either of a contract or a statute, intended for his benefit. * * * If he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal has ceased, he ought not to be permitted to raise the objection at all. If he may, he is permitted to avail himself of what is *substantially a fraud.*

Although voluntary choice and not *mere* negligence is ordinarily the test of a waiver, yet from negligence unexplained or long failure to act, an intention or election to waive may fairly be inferred.

Fishback v. *Van Dusen & Co.*, 33 Minn., 117.
Shutte v. *Thompson*, *supra*.

Especially is this true where, as in the present case, the situation of the parties has changed and large sums of money have been expended by the defendant on account of this negligence.

II.

Assuming that Runkle's Case, *supra*, applies to appellant, then under the decision in *Blake's Case* (103 U. S., 227) he was removed by the act of the President of the United States in appointing his successsor, who was confirmed by the Senate.

William C. Ide was appointed a captain in the Thirteenth Infantry, by regimental assignment; he commanded Company C in that regiment; therefore the dismissal of Capt. Ide created a vacancy of the office of captain in the Thirteenth Regiment of Infantry; there was no such office as that of captain of Company C.

Capt. William G. Rankin was transferred to the Thirteenth Regiment to fill the vacancy created by the dismissal of Capt. Ide.

But if Capt. Ide was not dismissed the service in pursuance of the sentence of the court-martial, then the appointment of Rankin did not affect his position of captain in the Thirteenth Infantry. He was not super-

seded by the appointment of a successor confirmed by the Senate. So as to Capt. Seth Bonney, his succession of Rankin did not necessarily affect Ide, who still remained a captain. But when Lieut. H. P. Ellis was appointed by the President to be captain of the Thirteenth Infantry and his appointment was confirmed by the Senate, the case of Capt. Ide came strictly within the ruling in the Blake Case, *supra;* he was superseded or removed by the appointment and confirmation of a successor.

If Capt. Ide still remained a captain of the Thirteenth Infantry, notwithstanding his dismissal, for that reason neither Rankin nor Bonney were legally his successor. They were assigned to his position in the regiment without filling a vacancy. They held the position of captain *de facto* but not *de jure.* Their assignment or transfer was the act of the Secretary of War, who had no lawful right to dismiss claimant from his office. Ellis was appointed and confirmed to the position, which was supposed to have been rendered vacant by claimant's supposed dismissal. His appointment and confirmation being authorized and regular, under the decision in Blake's Case *supra*, he superseded claimant, who from that date was out of the service.

It is true that the appointment of Capt. Ellis in this case was *vice* Bonny, resigned; but it was, nevertheless, an appointment to the captaincy of the Thirteenth Regiment—the office held by the appellant. Says Mr. Justice Harlan, delivering the opinion of the court in Blake's case, *supra:*

> It results that the appointment of Gilmore, with the advice and consent of the Senate, *to the office*

> held by Blake operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after at least the date at which that appointment took effect, and this without reference to Blake's mental capacity to understand what was a resignation. * * * Having ceased to be an officer in the Army, he could not again become a post chaplain, except upon a new appointment by and with the advice and consent of the Senate.

See also *McElrath* v. *United States*, 102 U. S., 426; *Mimmack* v. *United States*, 97 U. S., 426, 437.

III.

If, however, the court should be of opinion that the appellant continued to hold his office until the appointment and confirmation of his successor in 1872, then the respondents plead the statute of limitations and submit that any claim prior to that date (as well as to within six years prior to filing the petition) can not be recovered.

> His claim for salary during the above period accrued more than six years * * * before the commencement of this action. The Government pleads the statute of limitations and must be sustained. Congress alone can give him the relief which he seeks. (Per Mr. Justice Harlan in *Blake* v. *United States*, 103 U. S., 227–237.)

The court must take cognizance of the statute of limitations in actions against the Government whether the same be specially pleaded or not. (Kendall's Case, 14 Ct. Cls., 122).

Wherefore it is submitted that there is no error in the judgment of the Court of Claims and that the same should be affirmed.

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